No. 18633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET DAVIS, *et al.*,

Appellants,

vs.

PAULINE D. MCLAUGHLIN, Administratrix of the Estate of Ingram M. Stainback, deceased,

Appellee.

BRIEF OF APPELLEE.

MITCHELL, SILBERBERG & KNUPP and
HOWARD S. SMITH,
FONG, MIHO, CHOY & ROBINSON and
KATSURO MIHO,
By HOWARD S. SMITH,
6399 Wilshire Boulevard,
Los Angeles 48, Califorina,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases Page

Rules

Statutes

Textbook

No. 18633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET DAVIS, *et al.*,

Appellants,

vs.

PAULINE D. MCLAUGHLIN, Administratrix of the Estate of Ingram M. Stainback, deceased,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

This action was commenced in the United States District Court for the District of Hawaii by appellants as plaintiffs against J. Frank McLaughlin, administrator of the estate of Ingram M. Stainback, deceased. Jurisdiction was based on diversity of citizenship and amount in controversy. 28 U. S. C. §1332. [See Paragraph 1 of the Complaint, Tr. p. 3.] Subsequent to the commencement of this action, Pauline D. McLaughlin, administratrix *de bonis non* of the estate of Ingram M. Stainback, deceased, was substituted as defendant in place of the late Judge McLaughlin. [Tr. pp. 32-33.]

The district court dismissed this action with prejudice. [Tr. pp. 12-13.] An appeal was taken to this court pursuant to rule 73 of the Federal Rules of Civil

Procedure and 28 U. S. C. §§ 1291 and 2107. Appellee moved to dismiss the appeal on the ground that this court has no jurisdiction of the appeal; this motion was denied by written order dated July 8, 1963.

Statement of the Case and of the Proceedings Below.

Appellants' brief contains no statement of the case. As we think such a statement will assist the court in determining this appeal, a summary of the material proceedings below follows. Throughout the remainder of this brief, plaintiffs and appellants will be designated "appellants" and defendant and appellee and her predecessor defendant-administrator will be designated "appellee."

Appellee's intestate, Ingram M. Stainback, was for many years Governor of the Territory of Hawaii.

This action was filed by appellants on December 8, 1961. The gist of appellants' asserted claim, as disclosed by the complaint and Exhibit A thereto (a copy of a Statement of Claim of Creditors made by appellants to, and rejected by, Governor Stainback's administrator) is [Tr. pp. 2-10]:

> After the death of Governor Stainback's wife, Cecile White Stainback, on October 11, 1949, Governor Stainback destroyed her will, in which she had bequeathed all her property to her parents, and concealed property belonging to her from the administrator of her estate. On February 19, 1952 the net estate of Mrs. Stainback was distributed one-half to appellants[1] and one-half to Governor

[1]The estate was distributed one-half to Governor Stainback and one-fourth each to the estates of the mother and father of appellants. Appellants allege that the net estates of their parents were

ultimately distributed to them. [Tr. p. 7.]

Stainback. Governor Stainback died intestate on April 12, 1961.

On January 16, 1962 a notice to take the deposition of appellant Georgia McPheeters was filed. [See Tr. p. 49.] After some difficulty, appellant McPheeters' deposition was taken in Honolulu on Saturday, January 27 and Sunday, January 28, 1962. [See Tr. pp. 73-77 and 110-113.]

On January 31, 1962 appellants filed and served written interrogatories to appellee. Appellee filed answers to these interrogatories on February 26, 1962, and an amended answer on March 9, 1962. [See Tr. p. 49.]

On June 15, 1962, appellee filed a motion to dismiss or for a more definite statement. [Tr. pp. 53-56.]

On July 2, 1962, the deposition of appellant Georgia McPheeters was filed in the district court. [See Tr. p. 49.]

On July 6, 1962, before any hearing on appellee's motion to dismiss or for a more definite statement, appellants' attorney, E. D. Crumpacker, Esq., filed a motion for leave to withdraw as counsel for appellants. [Tr. pp. 57-58.] On July 12, 1962 there was a lengthy hearing on Mr. Crumpacker's motion in which appellant McPheeters personally participated. [Tr. pp. 141-174.] Appellee opposed Mr. Crumpacker's request for leave to withdraw as counsel for appellants. [Tr. p. 162.] After hearing both Mrs. McPheeters and Mr. Crumpacker, the court conditionally granted Mr. Crumpacker's motion for leave to withdraw but ordered him to notify each appellant other than appellant McPheeters that he had moved to withdraw as their attorney, that

there would be a further hearing on his motion to withdraw, and that unless appellants appeared and showed cause why he should not be permitted to withdraw, he would be so permitted. [Tr. pp. 167-170.] The court further ordered Mr. Crumpacker to send a copy of appellee's motion to dismiss to each appellant with notice that the motion would be heard at 9:00 A.M. on September 4, 1962. [Tr. pp. 170-174. See Tr. pp. 49 and 136.] On July 20, 1962 the court granted Mr. Crumpacker leave to withdraw [Tr. p. 136], and a written order to that effect was filed on July 26, 1962. [Tr. pp. 59-60.]

On August 30, 1962 appellants' present counsel, Brahan Houston, Esq, filed his appearance [Tr. pp. 24-25] and a notice of dismissal—purportedly without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure. [Tr. pp. 61-62.]

The same day—August 30, 1962—that appellants purported to dismiss this action in the district court they commenced in the Circuit Court of the First Circuit of the State of Hawaii a new suit based on the same claim asserted in this action. The defendants in the state court action were Judge McLaughlin as administrator of the estate of Governor Stainback and the Cooke Trust Company, Ltd., which had been administrator of Mrs. Stainback's estate.[2]

---

[2]On December 19, 1962 the district court granted leave to appellants and appellee to file copies of the various papers which had been filed in the state court action. [Tr. p. 50.] These documents were filed with the clerk of the district court, although the transcript on appeal does not so indicate. The various documents filed in the state court, consisting of a summons and complaint, notice of dismissal, motion and affidavit to amend notice of dismissal, and notice of hearing and order denying motion to amend notice of dismissal, were designated by appellee

On September 7, 1962 appellee moved to strike the notice of dismissal filed by appellants or in the alternative that the court permit dismissal by appellants only on just and reasonable terms and conditions. [Tr. pp. 63-64.] On September 17, 1962 the district court "ruled that the notice of dismissal stand, conditioned upon the payment to defendant of his costs, etc., and if an agreement on the amount cannot be reached, then hearing on the matter be set for November 1, 1962 at 9 a.m." [Tr. p. 136. See also Tr. p. 49.] A written order to this effect which also provided that counsel for the respective parties should confer in an attempt to agree on the amount appellants should pay appellee was filed on October 1, 1962. [Tr. pp. 65-66.]

Appellee filed memoranda of costs and attorneys' fees and affidavits with respect thereto on November 1 and November 8, 1962. [Tr. pp. 67-69; 70-78.]

On November 8, 1962, at a continued hearing on the amount of costs and attorneys' fees to be assessed, the district judge made it clear that in his opinion the only basis for a dismissal was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, and that unless otherwise specified in the order of dismissal, such a dismissal would be *without prejudice*. [Tr. p. 176.] The court set the amount of $4,967.25 as the amount to be paid by appellants to appellee as the condition of a voluntary dismissal without prejudice. [Tr. pp. 177-178.] On November 29, 1962 a written supplemental order on appellee's motion to strike appellants' notice of dis-

---

to constitute a part of the record on appeal in this action. [Tr. pp. 133-135.] We have been informed that they have been transmitted by the clerk of the district court to the clerk of this court.

missal was filed [Tr. pp. 94-95]; this order was amended in open court on December 19, 1962 [Tr. pp. 50-51, 138 and 202.] This supplemental order as so amended provides:

> "IT IS HEREBY ORDERED that the Plaintiffs jointly and severally pay to the Defendant or his legal successor within thirty (30) days from the entry hereof, the sum of FOUR THOUSAND NINE HUNDRED SIXTY SEVEN AND 25/100 DOLLARS ($4,967.25) for the costs and attorneys' fee incurred by Defendant in this matter; and in the event the Plaintiffs shall fail to meet this condition, this cause will stand dismissed with prejudice for failure to comply with terms and conditions of court."

On November 19, 1962, eleven days after the court had ruled that appellants' dismissal of this action without prejudice was to stand on condition that they pay appellee's costs and expenses in the amount of $4,967.25, appellants filed: (1) a motion to amend the complaint; (2) a document entitled "Plaintiffs' Election to Continue On In This Court and Cause"; and (3) a motion for Judge Pence to recuse himself "because of bias and prejudice on the part of the Honorable Martin Pence toward plaintiffs and their cause" together with an affidavit of appellants' attorney in support thereof. [Tr. pp. 79-87.]

The next day, November 20, 1962, appellants filed a document entitled "Plaintiffs' Joinder in Defendant's Motion to Strike Plaintiffs' Dismissal". [Tr. pp. 88-89.]

An affidavit of prejudice by appellant Georgia McPheeters was filed on November 29, 1962. [Tr. pp.

90-93.] The same day the motion for Judge Pence to recuse himself was denied. [Tr. pp. 50 and 138.]

On December 5, 1962 a written order denying appellant's motion for Judge Pence to recuse himself was signed and filed. [Tr. pp. 97-98.]

Appellants then filed motions to set aside the district court's orders. [Tr. pp. 99-101; 106-108.] On December 19, 1962 these motions were denied and, after an extensive colloquy between the court and counsel for appellants, the order dated November 29, 1962 was amended. [Tr. pp. 50, 138 and 182-204.]

On January 9, 1963 this action was ordered dismissed with prejudice for failure of appellants to fulfill the terms and conditions fixed by the court within the prescribed time. [Tr. pp. 12-15.]

Questions Presented.

There are but two questions presented by this appeal:

1. Did the district judge err in refusing to recuse himself?

2. Did the district court err in dismissing this action with prejudice upon the failure of appellants to meet the terms and conditions imposed by the court?

Appellee contends that the district court did not err either in denying appellants' motion that the district judge recuse himself or in dismissing this action with prejudice.

ARGUMENT.

I.

The District Judge Did Not Err in Refusing to Recuse Himself.

Appellants strongly charge the district judge with error and worse sins in his denial of their motion that he recuse himself. The facts and applicable law clearly establish, however, that the district judge committed no impropriety whatsoever in refusing to recuse himself. The following discussion is perhaps more extensive than it need be. We present it, however, because of the virulence and persistence of appellants' personal attack on Judge Pence. We wish to show that Judge Pence's refusal to disqualify himself was correct and in accordance with his obligations under well-settled law.

The motion for Judge Pence to recuse himself states that it is made "because of bias and prejudice on the part of the Honorable Martin Pence towards Plaintiffs and their cause" and "is based on the record and the memorandum in support of the Motion attached hereto." [Tr. p. 84.] The affidavit of Mr. Houston attached to the motion complains against Judge Pence solely because of an alleged statement to Mr. Houston by one of appellee's attorneys to the effect that Judge Pence, on being informed that counsel had not conferred as ordered by him, stated "that if counsel for plaintiffs did not get together with counsel for defendant, he would be sorry." [Tr. p. 86.]

The affidavit of prejudice of appellant Georgia McPheeters alleges that Judge Pence is biased against appellants because:

(1) At the hearing before Judge Pence on the motion of appellants' former attorney, Mr. Crumpacker, for leave to withdraw as appellants' attorney, Mr. Crumpacker allegedly charged appellants with bad faith and "disparaged" them. Judge Pence expressed confidence in Mr. Crumpacker's integrity and granted him permission to withdraw as appellants' attorney.

(2) "[I]t is impossible for Judge Pence to disabuse his mind of the impression created by Mr. Crumpacker's said disparagement of plaintiffs and their cause of action" and Judge Pence "in his remarks from the bench on November 8, 1962" had shown "conclusively that Judge Pence holds Mr. Crumpacker's remarks against plaintiffs and is influenced by them at this late day."

(3) The same alleged statement attributed to one of appellee's attorneys by Mr. Houston in his affidavit in support of the motion for Judge Pence to recuse himself.

(4) That Judge Pence imposed the payment by appellants of "nearly $5,000.00" to appellee as a condition of the voluntary dismissal without prejudice of this action.

(5) That Judge Pence allegedly made a certain ruling in this action; "that plaintiff relied on this wholly arbitrary action of Judge Pence in their Motion to Disqualify Judge Pence, filed November 16, 1962, that Judge Pence thereafter or thereupon changed his ruling, but that the

> **fact that he made such a ruling shows his prejudice against plaintiffs.**" (Emphasis supplied.) [Tr. pp. 91-93.]

In their brief on appeal appellants rely only on one *fact* to support their contention that Judge Pence erred in refusing to disqualify himself—that Judge Pence presided at the hearing on the motion of Mr. Crumpacker, appellants' former attorney, for leave to withdraw as appellants' attorney. Appellants allege that at that hearing Mr. Crumpacker "publicly crucified" his clients, made statements "to impeach his clients and discredit their case" (Brief of Appellants, p. 6), and "denigrated plaintiffs' case" (App. Br. p. 7). Having thus characterized the statements of Mr. Crumpacker, appellants next make sinister inference from statements of Judge Pence that he knew Mr. Crumpacker's reputation and background and that he believed that Mr. Crumpacker had acted with honesty, sincerity, integrity and candor. [App. Br. pp. 2. 3 and 9. See Tr. pp. 155-156 and 157.] From these characterizations and inferences appellants conclude:

> "[I]t would seem to be humanly impossible for . . . [Judge Pence] to disabuse [his] . . . mind of the effect of the abovementioned representations made by the said attorney or to escape the conclusion or the suspicion that plaintiffs' suit is vexatious. So it seems to plaintiffs and they believe they have taken a common sense view of the matter." (App. Br. pp. 3-4.)

And:

> "It was obvious that Appellants would encounter a disadvantage in trying their case before Judge Pence which they would not encounter in a

> trial before Judge Tavares. It would seem that the slightest sensitivity to judicial impropriety would have moved Judge Pence to let Judge Tavares try the case." (App. Br. p. 9.)

Appellants have apparently forgotten the care Judge Pence took to protect their rights. In addressing Mrs. McPheeters, he pointed out that he did not "know enough about the facts and cannot know enough about the facts until the case is tried to say whether or not what was done at that time affects your own particular claim." [Tr. p. 161.] He directed that all appellants receive formal written notice that Mr. Crumpacker's motion to withdraw would be heard so that they might have an opportunity to appear and be heard, either personally or by counsel; he carefully and in detail advised Mrs. McPheeters that at the next hearing on Mr. Crumpacker's motion, Mr. Crumpacker would be permitted to withdraw if appellants made no further showing, but that "If you [Mrs. McPheeters] or any of the rest of them [appellants] at that time wish to have the matter heard, I will formally consider anything which you or any of the rest of them wish to offer. . . ." [Tr. p. 169; see Tr. pp. 167-170.] He expressly advised Mrs. McPheeters that she and the other appellants could, if they wished, be represented by other counsel to oppose Mr. Crumpacker's withdrawal. [Tr. pp. 167-168.] He invited appellants to present something to him "which completely throws out the representation of counsel here". [Tr. p. 168.] He further required Mr. Crumpacker to send to each appellant a copy of appellee's motion to dismiss and to inform each appellant of the date on which that motion would be heard in order to give each appellant oppor-

tunity to consult with an attorney about that motion. [Tr. pp. 170-174.]

Appellants' contention that Judge Pence should have recused himself is based on two allegations: (1) at the hearing at which appellants' former attorney sought leave to withdraw as appellants' counsel, Judge Pence heard certain derogatory remarks about appellant's case made by their counsel which caused him to make up his mind that appellants' case had no merit; and (2) Judge Pence made certain rulings in this action adverse to appellants. As a matter of law neither of these allegations is sufficient to require Judge Pence to rescue himself.

The correctness of the denial of appellants' motion for Judge Pence to recuse himself is governed by 28 U. S. C. §144 which provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

In apparently the first case construing §21 of the Judicial Code of 1911, the predecessor of 28 U. S. C. §144, *Ex parte American Steel Barrel Co.,* 230 U. S. 35 (1913), the Court stated:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. *It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice.* It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term." 230 U. S. at 43-44. (Emphasis supplied.)

Section 21 of the Judicial Code of 1911 was again construed in *Berger v. United States,* 255 U. S. 22 (1921), in which the Court held sufficient to disqualify a district judge an affidavit of prejudice charging that the judge (Judge Kenesaw Mountain Landis) had a "personal bias and prejudice" against defendants, persons of German extraction, because of certain remarks

he had made before the trial derogatory to German-Americans. The Court specifically held in the *Berger* case that a district judge has "a lawful right to pass upon the sufficiency of an affidavit of prejudice filed against him." *Id.* at pages 30 and 36. The Court further held:

> "The case [*Ex parte American Steel Barrel Co., supra,* 230 U.S. 35] establishes that the bias or prejudice which can be urged against a judge *must be based upon something other than rulings in the case.*" *Id.* at p. 31. (Emphasis supplied.)
>
> "Of course, the reasons and facts for the belief the litigant entertains [that the judge is personally biased against him] are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Id.* at pp. 33-34.
>
> "The section [Section 21 of the Judicial Code] permits only the affidavit of a party, and Ex parte American Steel Barrel Co., supra, decides that *it must be based upon facts antedating the trial, not those occuring during the trial.*" *Id.* at p. 34. (Emphasis supplied.)

These two decisions of the Supreme Court show that Judge Pence did not commit error in denying appellants' motion that he recuse himself. He had the right to determine the legal sufficiency of the motion and affidavit of prejudice. The motion and affidavit were based solely on rulings made by him in the course of this action and on statements made (or alleged made) to or by him during proceedings in this action.

The decisions of this court emphasize the correctness of the ruling of Judge Pence refusing to

disqualify himself. In *Price v. Johnston*, 125 F. 2d 806 (9th Cir.), cert. denied, 316 U. S. 677 (1942), this court held insufficient as a matter of law an affidavit of prejudice alleging that the trial judge was prejudiced against the defendant in a criminal prosecution because the judge was a director or associated with a bank in the vicinity of the bank for the robbery of which the defendant was indicted. In so ruling, this court held:

> "[T]he trial judge did have the lawful right to pass upon the legal sufficiency of the affidavit." 125 F. 2d at p. 811.
>
> "The statute requires that the bias or prejudice be personal'. . . . The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—*a bias or prejudice possessed by the judge specifically applicable to or directed against suitor making the affidavit or in favor of his opponent.*" Appellant's allegations reveal that 'the facts and reasons advanced in support of the charge of bias and prejudice *do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy* * * *.' . . . It is immaterial that the trial judge may have assigned an incorrect reason for his ruling on the affidavit; the ruling was correct, and that is sufficient." *Id.* at pages 811-812, citations of authority omitted. (Emphasis supplied.)

Statements in an affidavit of prejudice that the judge has already made up his mind to decide against the affiant and that he therefore has a personal bias or prejudice against the affiant "are not statements of fact but are conclusions of the affiant" and therefore insufficient to require the district judge to disqualify himself even in a criminal case. *Willenbring v. United States,* 306 F. 2d 944 (9th Cir. 1962). Indeed, this court has characterized such allegations as "flagrant contempt of court." *Barnes v. United States,* 241 F. 2d 252, 254 (9th Cir. 1956).

This court has also held:

> "[S]uccessive rulings of the judge adverse to . . . [a party] and his comments on . . . [that party's] method of conducting his case . . . [do not] constitute personal prejudice against [that party]. . . ." *Beecher v. Federal Land Bank,* 153 F. 2d 987, 988 (9th Cir.), cert. denied, 328 U. S. 871 (1946).

In *Cole v. Loew's, Inc.,* 76 F. Supp. 872 (S.D. Cal. 1948), affirmed on this ground and reversed on other grounds, 185 F. 2d 641 (9th Cir. 1950), cert. denied, 340 U. S. 954 (1951), Judge Yankwich, in refusing to recuse himself, summarized the federal law of disqualification of a district judge as follows:

> "(1) The mere filing of an affidavit does not oust the judge from the cause.
>
> "(2) The judge has the right to determine the legal sufficiency of the affidavit.
>
> "(3) The bias or prejudice must be personal, i.e., antagonism or opposition to the litigant, or favoritism for his opponent.

> "(4) Definite views on the law, adverse rulings in the case on trial, or adverse rulings against the suitor in other cases or in cases involving similar facts do not constitute such disqualification, *even in a criminal prosecution.*" 76 F. Supp. at pages 876-877. (Emphasis in original.)

See also *Los Angeles Trust Deed & Mortgage Exchange v. Security and Exchange Commission,* 285 F. 2d 162, 172-173 (9th Cir. 1960), cert. denied, 366 U. S. 919 (1961); *Taylor v. United States,* 179 F. 2d 640, 644 (9th Cir.), cert. denied, 339 U. S. 988 (1950); and *Ferrari v. United States,* 169 F. 2d 353, 355 (9th Cir. 1948 ("as a prerequisite to the disqualification of a judge personal bias must be shown, which has been held to be an attitude of extrajudicial origin").

The allegations of the affidavit of prejudice and motion for the district judge to recuse himself at bar do not even remotely approach those in *Gladstein v. McLaughlin,* 230 F. 2d 762 (9th Cir. 1955) and *Connelly v. United States,* 191 F. 2d 692 (9th Cir. 1951), in which this court held that affidavits of prejudice adequately showed the personal bias and prejudice required by the statute. (See the summary of these two cases in *Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, supra,* 285 F. 2d 162 at p. 173 nn. 5 and 6.)

Judge Pence's denial of appellant's motion that he recuse himself is also supported by decisions of the other courts of appeals. These decisions clearly show that neither the affidavit of Mr. Houston nor the affidavit of prejudice of Mrs. McPheeters allege sufficient facts to require Judge Pence to recuse himself.

In *Craven v. United States,* 22 F. 2d 605 (1st Cir. 1927), cert. denied, 276 U. S. 627 (1928), the defendant in a criminal case filed an affidavit of prejudice prior to his second trial before the same judge who had presided at his first trial. The affidavit alleged bias and prejudice of the district judge against defendant and in favor of the United States predicated on alleged conduct of the district judge at defendant's first trial. In holding that the affidavit of prejudice did not contain allegations of facts sufficient to require the district judge to disqualify himself from presiding at the second trial, the court of appeals characterized the affidavit as follows:

> "All that is indicated is that at the first trial, on the basis of the evidence there adduced, the presiding judge acquired and exhibited before the jury (which nevertheless disagreed) a view that the defendant was guilty." 22 F. 2d at p. 607.

The court then held that "a general and epithetical charge of bias, by questions not set forth, is idle." *Ibid.* This holding is directly in point in the case at bar, as are these further statements of the court:

> "At most, then, the affidavit charges a 'bias and prejudice,' grounded on the evidence produced in open court at the first trial, and on nothing else. We hold that such bias and prejudice (if these be appropriate terms for a well-grounded state of mind, 255 U. S. 42, 41 S. Ct. 236, 65 L. Ed. 481) is not personal; that it is judicial. 'Personal' is in contrast with judicial; it characterizes an attitude of extrajudicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the duty

of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind, 255 U.S. 42, 41 S. Ct. 236, 65 L. Ed. 481) against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." *Id.* at pages 607-608.

"If, as happened in many of the cases reported, this statute is permitted to be used by overzealous counsel, scanting their professional duty to the public weal and to the court as the protector of the public right, as a method of procuring delay (U. S. v. Fricke [D.C.] 261 F. 541), and in many instances a new trial before a judge who must approach, de novo, problems already considered by another judge (Ex parte Am. Steel Barrel Co., 230 U.S. 35, 44, 33 S. Ct. 1007, 57 L. Ed. 1379) the statute will leave immune from attack only the amorphous dummies reprobated by Mr. Justice McReynolds as unbecoming receptacles for judicial power (255 U. S. 43, 41 S. Ct. 236, 65 L. Ed. 481). Only the timid and the incompetent, if there be now or hereafter any such on the federal bench, will be free from attack under this statute." *Id.* at page 608.

In *Gallarelli v. United States,* 260 F. 2d 259 (1st Cir. 1958), cert. denied, 359 U. S. 938 (1959), the Court in holding an affidavit of prejudice insufficient, stated:

"The courts have made it clear that a judge is obliged to remove himself only in the face of an af-

> fidavit setting forth 'a personal bias or prejudice', as distinguished from a judicial predilection obtained from the hearing of a case. . . ." *Id.* at page 261.

In *Eisler v. United States,* 170 F. 2d 273 (D.C. Cir.), cert. granted, 335 U. S. 857 (1948), ordered off docket, 338 U. S. 189, cert. dismissed, 338 U. S. 883 (1949), the court of appeals held insufficient an affidavit of prejudice which alleged that the district judge was prejudiced against the defendant because of the judge's background and experience prior to assuming the bench. The court stated:

> "[W]e consider it the duty of the judge, when the showing for recusation is insufficient, to remain in the case.
>
> ". . . Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute." *Id.* at page 278.

In *Palmer v. United States,* 249 F. 2d 8 (10th Cir. 1957), cert. denied, 356 U. S. 914 (1958), the court in holding an affidavit of prejudice insufficient stated:

> "The allegations contained in petitioner's affidavit are but complaint of adverse rulings made by the court and subjective conclusions as to the court's motives and manner in conducting the trial and subsequent proceedings. Such claims do not meet the requirements of 28 U.S.C.A. §144." 249 F. 2d at page 9.

See also:

Refior v. Lansing Drop Forge Co., 124 F. 2d 440 (6th Cir.), cert. denied, 316 U. S. 671 (1942) (district judge has authority to pass on legal sufficiency of the affidavit of prejudice filed against him; "the dismissal of a cause of action, coupled with a showing of irritation of the trial judge at the time of the entry of the orders, are not sufficient foundation for . . . [recusation], otherwise a litigant could experiment as to the attitude of a trial judge and relitigate issues before another judge, to the annoyance and expense of parties with resulting delay in the disposal of cases", *Id.* at page 445);

Deitle v. United States, 302 F. 2d 116, 118 (7th Cir. 1962) (an affidavit charging bias "predicated on the prior adverse rulings by the presiding judge" is insufficient);

Ryan v. United States, 99 F. 2d 864, 870-871 (8th Cir. 1938), cert. denied, 306 U. S. 635 (1939) ("judicial rulings cannot ordinarily be made the basis of a charge of bias or prejudice").

The foregoing authorities clearly establish that Judge Pence in no way acted improperly in refusing to disqualify himself. The motion that he do so, the affidavit of Mr. Houston in support thereof, and the affidavit of prejudice of appellant McPheeters allege no facts showing "personal bias and prejudice" of Judge Pence against appellants, but are based on prior judicial proceedings and rulings in this case; they are patently and wholly insufficient as a matter of law.

Additionally, there are good procedural grounds supporting Judge Pence's refusal to disqualify himself. The motion for disqualification and affidavit of preju-

dice were filed much too late, and the certificate of counsel is insufficient because it does not state counsel's good faith as distinguished from the affiant's good faith.

The statute requires that the affidavit of prejudice "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for the failure to file it within such time." 28 U. S. C. Sec. 144. In *In re United Shoe Machinery Corp.*, 276 F. 2d 77, 79 (1st Cir. 1960), the court pointed out that "one of the reasons for requiring promptness in filing [an affidavit of prejudice] is that a party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives." In *Pacheco v. People,* 300 F. 2d 759, 760 (1st Cir. 1962) the court stated: "If a judge is subject to disqualification, the party concerned must complain promptly. He cannot be allowed to wait to see how the judge decides."

In *In re Union Leader Corp.,* 292 F. 2d 381 (1st Cir.), cert. denied, 368 U. S. 927 (1961), the court held that the certificate of counsel accompanying an affidavit of prejudice must state counsel's good faith and assert that counsel believes the facts alleged in the affidavit are accurate and correct. 292 F. 2d at pages 384-385.

The court also pointed out in the *Union Leader* case that:

> "[A] judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary." *Id.,* at page 389.

> "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *Id.*, at page 391.

If, as appellants now claim, they believe that Judge Pence has a personal bias and prejudice against them because of what transpired at the hearing on Mr. Crumpacker's motion for leave to withdraw as their counsel, they should have filed their affidavit of prejudice and moved to disqualify Judge Pence at least prior to the hearing of appellee's motion to strike their notice of dismissal or grant dismissal on terms and conditions, not over two months after Judge Pence announced his ruling on appellee's motion adverse to the appellants. [Judge Pence ruled on appellee's motion and ordered that appellants' dismissal stand, conditioned on payment of appellee's costs, on September 17, 1962. Tr. p. 136. The formal written order (prepared by appellants' counsel, Mr. Houston) was dated September 28, 1962 and filed October 1, 1962. Tr. pp. 65-66. The motion for Judge Pence to recuse himself was filed November 19, 1962. Tr. pp. 83-87. The affidavit of prejudice was filed November 29, 1962. Tr. pp. 90-93.]

The certificate of Mr. Houston annexed to the affidavit of prejudice states only that "in his opinion the Plaintiffs filed their Motion to disqualify Judge Martin Pence in the cause in good faith, honestly, believing said Judge to be prejudiced against them and that Plaintiff Georgia McPheeters made the foregoing affidavit in good faith reasonably believing the facts therein stated show prejudice on the part of Judge Martin Pence towards the Plaintiffs." Nowhere does Mr. Houston certify either his good faith or his belief

that the facts stated in the affidavit of prejudice are accurate and correct.

For all the reasons discussed, Judge Pence in no way acted improperly or erroneously in refusing to disqualify himself. The motion that he do so and affidavit of prejudice were insufficient as a matter of law; they were untimely; and the certification of counsel required by the statute was insufficient.

II.

The District Court Did Not Err in Dismissing This Action With Prejudice.

The facts of the dismissal of this action with prejudice by the district court are simple although appellants' brief has obscured and obfuscated them. The principles of law pertaining to that dismissal are clear and settled. These facts and principles establish that the district judge acted within his discretion in dismissing this action with prejudice.

A. The Order of the District Court Was That This Action Would Be Dismissed Without Prejudice Upon Appellants' Meeting the Conditions Imposed by the District Court and With Prejudice Only If Appellants Did Not Comply With Those Conditions.

Appellants' purported notice of dismissal without prejudice of this action was filed August 30, 1962. [Tr. pp. 61-62.] This notice of dismissal was filed *after* appellee had incurred substantial expense in preparing her defense to this action; *after* appellee had taken the deposition of appellant Georgia McPheeter; *after* appellee had incurred substantial unnecessary expense in connection with Mrs. McPheeter's deposition caused solely by her deciding after her deposition had been set for

Los Angeles, the city of her residence, to have her deposition taken in Honolulu; and *after* appellee had filed a motion to dismiss this action which was to be based in part on matters outside the pleadings. This notice of dismissal was also filed after appellants had served interrogatories on appellee and after appellee had answered those interrogatories. [For the substantial expense incurred by appellee in preparing a defense to this action, and the unnecessary additional expense caused appellee by appellant McPheeter, see the Memoranda of Costs and Attorneys Fees filed November 1, 1962 and November 8, 1962, the Affidavit of Howard S. Smith re Costs and Legal Fees Incurred by Defendant filed November 8, 1962, and the Supplemental Affidavit of Howard S. Smith re Employment of Firm of Mitchell, Silberberg & Knupp, filed December 12, 1962. Tr. pp. 67-72, 73-78, and 109-113. The district court's docket indicates that appellants filed written interrogatories to appellee on January 31, 1962, and that answers to these interrogatories were filed on February 26, 1962, and an amended answer filed on March 19, 1962. Tr. p. 49.]

Appellee's motion to dismiss or for more definite statement was filed June 15, 1962 [Tr. pp. 53-56]; on July 2, 1962, the deposition of appellant McPheeters was filed. [Tr. p. 49.]

On September 7, 1962, appellee filed a motion to strike appellants' notice of dismissal or to grant dismissal only on such terms and conditions as the court deemed just and reasonable. [Tr. pp. 63-64.] The hearing on this motion was on September 17, 1963. At that time the court ordered "that the notice of dismissal stand, conditioned upon the payment to defendant of

his costs." [Tr. p. 136.] The formal order to that effect, prepared by Brahan Houston, appellant's counsel, expressly provided "that this cause may stand dismissed pursuant to plaintiff's Notice to Dismiss [*i.e. without prejudice*], on the condition that plaintiffs pay defendant his costs, including attorneys' fees, incurred herein." [Tr. p. 66.]

On November 8, 1962, a further hearing was had on the matter of the costs and expenses to be paid by appellants as the condition to dismissal without prejudice. The court began that hearing with the statement that the only basis for a dismissal was under Rule 41(a)(2) of the Federal Rules of Civil Procedure and that "unless otherwise specified in the order of dismissal under this paragraph, *it is without prejudice.*" [Tr. p. 176, lines 3-10. Emphasis supplied.]

A written supplemental order on appellee's motion to strike appellants' notice of dismissal was signed and filed November 29, 1962 [Tr. pp. 94-95]; this order was amended in open court on December 19, 1962 [Tr. pp. 50-51, 138 and 202]. As so amended this supplemental order provides:

> "IT IS HEREBY ORDERED that the Plaintiffs jointly and severally pay to the Defendant or his legal successor within thirty (30) days from the entry hereof, the sum of FOUR THOUSAND NINE HUNDRED SIXTY SEVEN AND 25/100 DOLLARS ($4,967.25) for costs and attorneys' fees incurred by Defendant in this matter; and in the event the Plaintiffs shall fail to meet this condition, this cause will stand dismissed with prejudice for failure to comply with terms and conditions of court."

It is therefore clear beyond doubt that the order of the district court was that this action would be dismissed *without prejudice* upon appellants' meeting the conditions imposed by the court, and with prejudice *only* should appellants not meet those conditions. That this was the intention of the district judge is shown by part of the colloquy between him and Mr. Houston on December 19, 1962. [See Tr. p. 201, line 22, to p. 203, line 6.]

This colloquy in part is as follows:

> "Mr. Houston: Your Honor has ruled that the case be dismissed with prejudice under your Honor's inherent jurisdiction to do so.
>
> The Court: Well, that is if the terms aren't met, yes.
>
> Mr. Houston: Well, now, that means that your Honor would be dismissing with prejudice for the failure of the plaintiffs to meet the terms of the Order.
>
> The Court: Yes." [Tr. p. 201, line 22, to p. 202, line 4.]
>
> "The Court: Yes. I will delete from the supplemental order of November 29th, the words 'For failure to prosecute,' and rather, the wording will be 'For failure to comply with the terms and conditions fixed by the court.'" [Tr. p. 202, lines 19-22.]

B. The District Court Had Discretion to Order That This Action Could Be Dismissed by Appellants Without Prejudice Only on Just and Reasonable Terms and Conditions.

Rule 41(a)(1) of the Federal Rules of Civil Procedure limits the absolute right of a plaintiff to a voluntary dismissal without prejudice by requiring that such a dismissal may be had only "at any time before service by the adverse party of an answer or of a motion for summary judgment."

Rule 41(a)(2) provides that after a filing of an answer or motion for summary judgment "an action shall not be dismissed at the plaintiff's instance, save upon order of the court and upon such terms and conditions as the court deems proper."

While the motion filed by appellee was denominated a motion to dismiss, the district court and all parties treated it as a motion for summary judgment under that portion of Rule 12(b) which provides that if on a motion to dismiss matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. Appellants have never contended to the contrary. The motion referred to matters outside the pleadings since it was made on the grounds, among others, of laches, the statute of limitations and that appellant's claim "is entirely conjectural and without any foundation in fact" [Tr. pp. 54-55], and the deposition of appellant McPheeters was filed for use by the court in connection with the hearing and determination of that motion.

While Rule 41(a)(1) refers to an answer or motion for summary judgment as cutting off the absolute right of a plaintiff to a voluntary dismissal, the cases have

construed that section as terminating that right upon the filing of a motion or pleading raising substantial issues on the merits not raised by the complaint. In *Harvey Aluminum Inc. v. American Cyanamid Co.*, 203 F. 2d 105, 107-108 (2d Cir.), cert. denied, 345 U. S. 964 (1953) the court stated the purpose of Rule 41(a) as follows:

> "The purpose of this rule is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined. 5 Moore's Fed. Practice 1007 (2d ed.). The amount of research and preparation required of defendants was stressed by the Committee Note when Rule 41-(a) 1 was amended in 1948 as a reason for adding the reference to a motion for summary judgment. 5 Moore's Fed. Practice 1005 (2d ed.) . . . . Consequently, although the voluntary dismissal was attempted before any paper labeled 'answer' or 'motion for summary judgment' was filed, a literal application of Rule 41(a) 1 to the present controversy would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached."

See also:

> *Littman v. Bache & Co.*, 252 F. 2d 479 (2d Cir. 1958).

In the *Harvey Aluminum* case it was held that a motion for preliminary injunction which had been briefed, argued and determined barred plaintiff's right to a voluntary dismissal even though no answer or motion for summary judgment had been filed.

In *Butler v. Denton,* 150 F. 2d 687 (10th Cir. 1945) it was held that the filing of a plea in intervention which tendered justiciable issues barred plaintiff's absolute right to a voluntary dismissal even though no answer or motion for summary judgment had been filed.

It has been squarely held that a motion to dismiss which raises the issue of the statute of limitations, as does the motion to dismiss filed by appellee here, should be considered an answer for the purposes of Rule 41(a). *Baker v. Sisk,* 1 F. R. D. 232 (E.D. Okla., 1938). It has also been squarely held that a motion to dismiss for failure to state a claim upon which relief can be granted should be regarded as the equivalent of a motion for summary judgment for the purpose of applying Rule 41(a), especially where, as in this case, that motion is one that could have been treated as one for summary judgment under Rule 12(b). *Tele-Views News Co. v. S.R.B. TV Publishing Co.,* 28 F. R. D. 303, 306-308 (E.D. Pa., 1961).

Under any of the foregoing criteria, the district court's refusal to permit appellants to dismiss without prejudice without the imposition of terms and conditions was correct. Appellee had incurred substantial expense to prepare her defense to this action. Substantial discovery had taken place. A motion that was obviously intended to be a motion for summary judgment, although denominated a motion to dismiss, had been filed. That motion raised substantial issues going to the merits of this action, including laches, the statute of limitations, failure of appellants to return property already received as required by law, and that the action was "without any foundation in fact."

Kilpatrick v. Texas & P.R.R., 166 F. 2d 708 (2d Cir.), cert. denied, 335 U. S. 814 (1948) is not applicable to this case. The motion which was there held insufficient to bar plaintiff's absolute right to a voluntary dismissal without prejudice was a motion seeking dismissal because of lack of jurisdiction over the person of defendant. The court there pointed out that such a motion set up no matter introducing issues not raised by the complaint. 150 F. 2d at page 687. The motion filed in this case, however, raised issues going directly to the merits of the controversy.

The district court unquestionably has broad discretion in devising and imposing terms and conditions of a dismissal without prejudice under Rule 41(a)(2). See *American Cyanamid Co. v. McGhee*, 217 F. 24 295, 298 (5th Cir. 1963); *Blue Mountain Construction Co. v. Werner*, 270 F. 2d 305 (9th Cir. 1959), cert. denied, 361 U. S. 931 (1960); *Standard Natl. Ins. Co. v. Bayless*, 272 F. 2d 185 (5th Cir. 1959); *Diamond v. United States*, 267 F. 2d 23 (5th Cir.), cert. denied, 361 U. S. 834 (1959). This discretion includes the right to impose as a condition of dismissal the payment by plaintiff of defendant's attorneys' fees. *Federal Savings and Loan Ins. Corp. v. Reeves*, 148 F. 2d 731 (8th Cir. 1945), in which an award of attorneys' fees and expenses in the amount of $6,741 was held within the lawful discretion of the trial court; *New York C. & St. L. R.R. v. Jardaman*, 181 F. 2d 769, 771 (8th Cir. 1950). See for a general discussion, 5 Moore, *Fed. Practice* ¶41.06 (2d ed.). That the district judge carefully weighed the evidence presented to him in exercising his discretion and assessing the amount of costs to be paid by appellants is shown by his statements

in open court on the subject. [Tr. pp. 176-181; 192, line 8, to 194, line 24.]

C. The District Court Did Not Err in Dismissing This Action With Prejudice When Appellants Failed to Meet the Conditions Imposed by the Court.

The order of the district court directing that this action be dismissed with prejudice for failure of appellants to comply with the conditions imposed by the court was correct. Identical orders have been upheld without any question of their propriety. In *De Filippis v. Chrysler Sales Corp.*, 116 F. 2d 375 (2nd Cir. 1940) plaintiff was permitted to dismiss without prejudice

> "upon condition that the appellant (plaintiff) pay to the appellee (defendant) two hundred and fifty dollars within thirty days with the proviso 'that in the event no such payment is made, this cause be and the same is hereby dismissed on the merits and with prejudice to any further suit on the patent herein, with respect to the devices complained of herein'." 116 F. 2d at p. 376.

Plaintiff did not meet the condition imposed by the court and a judgment of dismissal with prejudice was ultimately entered. In affirming this judgment the court of appeal stated:

> "When the time for the payment of the terms imposed expired without compliance with the order the entry of an order which took cognizance of that fact and dismissed the suit would have done away with any possible doubt as to whether and when a final order had been made." *Ibid.*

In *Stern v. Inter-Mountain Telephone Co.*, 226 F. 2d 409 (6th Cir. 1955), an order requiring the plaintiff to

pey certain expenses and permit his deposition to be taken as conditions to a dismissal without prejudice and ordering that the dismissal be with prejudice for failure to meet those conditions was held to be clearly within the scope of Rule 41(a). A judgment of dismissal with prejudice for failure of plaintiff to comply with these conditions was affirmed.

D. The District Court Did Not Err in Refusing to Set Aside Its Order of Dismissal.

Appellants filed various motions and papers in the district court which in effect sought to have the district court set aside its orders permitting this action to stand dismissed on the payment of costs and expenses and reinstate this action. Appellants made no showing whatsoever that would require the district court to grant such motions. Indeed, appellants' conduct throughout this litigation has been such as to wholly justify the action of the district court. They have persistently and maliciously maligned and abused the district judge. They vexatiously multiplied expenses in this action. They filed a complaint against appellee and another in the Hawaii State Court, based on the same claim asserted in this action, which was indecent and scandalous. They then dismissed the State Court action voluntarily and later sought to revive it against appellant. They did not even attempt to make any showing that their claim in this action is meritorious to support their request that the district court set aside its orders. Appellants' conduct throughout the proceedings in the district court and, we submit, in this court, have shown a bent and determination by them to abuse and misuse the judicial process to vent their unfounded spleen on the district judge and on appellee's decedent, the late Governor Stainback.

Conclusion.

For all the reasons above stated, we submit that the district judge committed no error. Appellants have not made any showing that the district judge in any way abused any discretion reposed in him. The judgment below should therefore be affirmed.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP and
HOWARD S. SMITH,
FONG, MIHO, CHOY, & ROBINSON and
KATSURO MIHO,

By HOWARD S. SMITH,

Attorney for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD S. SMITH,
Attorney for Appellee.